

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-20

DATE ISSUED: September 15, 1998

ISSUED TO: Mike Every, Minnewaukan City Mayor
Karen Mitzel, Minnewaukan City Auditor

CITIZEN'S REQUEST FOR OPINION

On June 22, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mark Wallace asking whether the City of Minnewaukan violated N.D.C.C. § 44-04-18 by failing to provide copies of requested public records within a reasonable time.

FACTS PRESENTED

Mark Wallace first requested information pertaining to the city of Minnewaukan's charges for sewer and water on January 4, 1998. On April 17, 1998, Mr. Wallace met with City Councilman Sherman Cline at the city offices to obtain the information he requested. Following that meeting, Mr. Wallace wrote another letter dated April 21, 1998, indicating that some of the information he had requested could not be located by Councilman Cline. Specifically, Mr. Wallace still wanted a copy of the current city ordinance regarding charges for sewer and water and the previous charges for those services for apartment complexes in Minnewaukan. Attached to the letter were spreadsheets prepared by Mr. Wallace which he wanted the city auditor to complete.

The minutes of the May 4, 1998, city council meeting indicate that the council authorized the extra salary of the auditor to pay her for the additional time that was necessary to gather the information Mr. Wallace requested. The spreadsheets provided by Mr. Wallace were completed by the city auditor, with some information inadvertently left out, in early May.

On May 22, 1998, Mr. Wallace requested the following Minnewaukan city records:

1. The current ordinance regarding the charges for sewer and water;

2. The previous charges for city services for the apartment complexes in Minnewaukan; and
3. The minutes of meetings regarding the notations made on records previously provided to Mr. Wallace.

Mr. Wallace received no response to this request until a July 2, 1998, letter from Minnewaukan City Auditor Karen Mitzel.

Ms. Mitzel's response indicated that a copy of Mr. Wallace's May 22 letter was provided to the members of the Minnewaukan City Council before their June meeting, but that no action was taken. Regarding the three requests for information in the letter, Ms. Mitzel indicated that City Councilman Sherman Cline told her Mr. Wallace had already received a copy of the current ordinance. She also provided the requested additional information that was not included in the spreadsheets she previously had completed and returned to Mr. Wallace. Finally, she informed Mr. Wallace that there was no mention in the minutes of the City Council meeting of Councilman Cline's direction to refund any overpayment. Regarding the time that lapsed between Mr. Wallace's May 22 request and her July 2 response, the city auditor indicated to this office that she was employed by the city on a part-time basis (95 hours per month) and answered the May 22 request as soon as she was able.

ISSUES

1. Whether a copy of the current city ordinance regarding the charges for sewer and water was provided within a reasonable time.
2. Whether the city was required to provide information on the previous charges for city services for the apartment complexes in Minnewaukan.
3. Whether an explanation was provided within a reasonable time why the city was not providing Mr. Wallace the minutes he requested regarding the notations made on records previously provided to Mr. Wallace.

ANALYSES

Issue One:

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Once a request for records is made to a public entity under N.D.C.C. § 44-04-18, the public entity must either provide the records or explain why the request is not being satisfied. N.D.C.C. § 44-04-18(6). In either case, the public entity must respond within a reasonable time. N.D.C.C. § 44-04-18(8); 1998 N.D. Op. Att'y Gen. O-41, O-43. Also, once a person makes a request, no further action by the requester is necessary; the responsibility is on the public entity to provide the requested records or explain why the records are not being provided. 1998 N.D. Op. Att'y Gen. O-17, O-24.

In this case, Mr. Wallace obtained a document from Councilman Cline on April 17 which did not appear to Mr. Wallace to be the current ordinance. Mr. Wallace repeated his requests for the ordinance in his April 21 and May 22 letters. When the city auditor eventually provided a copy of the current ordinance with her July 2 letter, the ordinance was different from the record provided to Mr. Wallace by Councilman Cline on April 17.

The City was not required to provide Mr. Wallace with a second copy of the ordinance, but it was responsible, upon receiving subsequent requests for the current ordinance, for making sure that the record Mr. Wallace obtained on April 17 was the current ordinance. Presumably, Councilman Cline could have shown the city auditor the record that was copied for Mr. Wallace to determine if it was the current ordinance. If Mr. Wallace was provided something else, as was the case, the city was required to provide the requested record within a reasonable time. This failure resulted in Mr. Wallace not receiving the record he requested until receiving the city auditor's July 2 letter with an enclosed copy.

It is a violation of N.D.C.C. § 44-04-18 to fail to provide access to or copies of open public records within a reasonable time. This office has said:

An effort should be made to provide access or copies immediately. Depending on the circumstances, a delay may be appropriate for a number of reasons, including excising closed or confidential information, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, or balancing other responsibilities of the public entity that demand immediate attention. However, although an open records request need not always be given the highest priority among a public entity's responsibilities, it is clear that complying with an open records request is an important responsibility and a public entity cannot delay a response

unreasonably or indefinitely. Reasonable delays will usually be measured in hours or a few days rather than several days or weeks.

1998 N.D. Op. Att'y Gen. 0-17, 0-24 at fn. 2.

The requested ordinance should have been readily available and needed no excising. Thus, the amount of time that could reasonably pass before the city was required to provide the requested copy of the ordinance was relatively short. A delay of a few days while City Auditor Mitzel and Councilman Cline sorted out what had previously been provided to Mr. Wallace would have been acceptable, but nearly a month and a half passed before Ms. Mitzel provided the requested record. Although Ms. Mitzel works only part-time for the city, the city council authorized her at its May meeting to spend the extra time she needed to respond to Mr. Wallace's request. For these reasons, it is my opinion that the City's delay in responding to Mr. Wallace's May 22 request for a copy of a city ordinance was unreasonable and constituted a violation of N.D.C.C. § 44-04-18.

Issue Two:

Following his April 17 visit to the city offices, Mr. Wallace sent the city a spreadsheet he wanted completed with a detailed breakdown of sewer and water charges for various apartment complexes in Minnewaukan. Ms. Mitzel completed the spreadsheet in early May based on the information that was still available from city records and returned the spreadsheet to Mr. Wallace. When he wrote back on May 22 with questions regarding the information Ms. Mitzel supplied, she provided additional information that she had inadvertently left off the original spreadsheet.

Like the copy of the city ordinance, the additional information on Mr. Wallace's spreadsheet was not provided for nearly a month and a half after he asked for it. However, unlike his request for the ordinance, the request to complete the spreadsheet was not a request for a copy of specific city records. Rather, Mr. Wallace was asking the city auditor to complete a form he provided based on information he wanted the auditor to compile.

The open records law does not require a public entity to create a new record by compiling information derived from current city records, but merely requires the public entity provide copies of current city records. If a requester requests a copy of a record that does not exist, or for information that is not readily reflected on current city records, the city should notify the requester to that effect,

and should offer to let the requester review the city records to attempt to compile the information himself or herself.

Because Mr. Wallace's request was for information compiled by the auditor, rather than specific city records, it is my opinion that N.D.C.C. § 44-04-18 did not apply to that request and was not violated by the auditor's delay in providing that additional information.

Issue Three:

The third request in Mr. Wallace's May 22 letter was for the minutes of the meeting supporting a notation Ms. Mitzel made next to a specific entry on the spreadsheet that said "errors on billing; refund to be issued." The answer provided by Ms. Mitzel in her July 2 letter was that there was no reference in the minutes of the city council regarding the entry; it was just something she was told to do during the meeting.

As discussed above in Issue One, when a public entity receives a request for records, it must, within a reasonable time, either provide those records or explain why the records are not being provided. Here, the request was for minutes that do not exist, and therefore did not have to be provided, but that explanation was not provided for nearly a month and a half. As I concluded in Issue One, this delay was unreasonable and constituted a violation of N.D.C.C. § 44-04-18.

CONCLUSIONS

1. It is my opinion that the City violated N.D.C.C. § 44-04-18 by failing to provide a copy of the current city ordinance regarding sewer and water charges within a reasonable time.
2. It is my opinion that the City was not required to compile the requested information on sewer and water charges of various apartment complexes, and therefore did not violate N.D.C.C. § 44-04-18, which requires public entities to provide copies of records within a reasonable time.
3. It is my opinion that the City violated N.D.C.C. § 44-04-18 by failing to explain within a reasonable time why it was not providing the minutes of a meeting regarding notations on records Mr. Wallace previously received.

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STEPS NEEDED TO REMEDY VIOLATIONS

The City has remedied its violations, as much as possible, by providing the necessary information or explanation in a July 2, 1998, letter from City Auditor Mitzel to Mr. Wallace.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General

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